THE SENATE AMENDMENTS TO THE ARBITRATION TREATIES

BY AUGUSTUS O. BACON, U. S. SENATOR

THERE is no sentiment more universally entertained by the American people than that which favors peace among the nations and opposes war. It is in consequence no wonder that there was a general public expression in favor of the ratification of the recently proposed arbitration treaties with Great Britain and France so soon as it became known that these treaties had been negotiated by the President and had been transmitted by him to the Senate for its advice and consent. It is safe to say that this general demand for their ratification was based upon the confident belief that they were essential to provide the means, through international arbitration, for preventing war. The wide appeal which the advocates of these treaties made to the public sentiment was apparently based upon this assumption. No effort was made to inform the public of the present existence of the arbitration treaties already in force, which will be hereinafter mentioned, nor was there any attempt to indicate wherein the proposed treaties were more desirable or efficacious than these existing treaties; and there was a studious avoidance of a discussion of provisions in these proposed treaties which would endanger the public welfare and our vital interests and which were violative of the Constitution of the United States. It was sufficient for the purpose to laud peace and condemn war; and one is safely within the limits in the statement that ninety-nine out of a hundred of those who responded to these appeals in their laudable desire for peace had never read a line of these proposed treaties.

The urgency of the insistence so generally manifested for their ratification without any amendment can only be explained upon the existence of a wide-spread belief that

unless thus ratified there would be no existing treaties with these nations for the arbitration of international differences. The fact is, however, that there now exists the Hague Convention, which is a treaty between forty-five nations, including the United States and every other important nation of the earth, and also most of the lesser nations, providing the most elaborate machinery for the court of arbitration at The Hague, carefully and elaborately perfected in every detail, and open to them all for the peaceful arbitration of international differences. Not only so, but the United States have formally negotiated and made arbitration treaties with twenty-five nations, including in this number, with the exception of Germany only, all the important nations of the world, by which treaties it is solemnly agreed to submit for decision and settlement by this arbitration court at The Hague all the international differences embraced in the terms of these treaties which may arise between the United States and any one of these several twenty-five nations.

These general arbitration treaties are now in force between the United States and the following nations—*viz.*:

China, Denmark, France, Great Britain, Italy, Japan, Mexico, The Netherlands, Norway, Peru, Portugal, Salvador, Spain, Sweden, Switzerland, Austria-Hungary, Costa Rica, Haiti, Paraguay, the Argentine Republic, Bolivia, Ecuador, Uruguay, Chile, and Brazil.

All of these treaties with the above-named nations are identical in terms, the one with the other. They were negotiated by Mr. Root when Secretary of State. They are short, plain, and comprehensive. The agreement for arbitration in each of these several existing treaties is embraced in the first article, which is as follows:

"Article I. Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties."

The second article in each of these twenty-five treaties provides the proceedings through which there shall be made effective the submission of said differences to the Permanent Court at The Hague.

For convenience the foregoing existing arbitration treaties will hereinafter be denominated as the Root treaties.

The proposed treaties with Great Britain and France are likewise identical in form, the one with the other. They were negotiated by the present Secretary of State, Mr. Knox. The agreement for arbitration in each of these two treaties is embraced in the first paragraph of the first Article and is as follows:

"Article I. All differences hereafter arising between the High Contracting Parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other arbitrable tribunal, as shall (may) be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, to define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder."

The second and third paragraphs of this first Article in each of these two treaties, as is done in the Root treaties, further provide the proceedings through which there shall be made effective the submission of said differences to the court of arbitration.

For convenience the foregoing two proposed treaties with Great Britain and France will hereinafter be designated as the Knox treaties.

A comparison of these two agreements to submit differences to arbitration, the one in the Root treaties and the other in the Knox treaties, does not disclose such vital difference in scope and in practical effect as to make it a matter of supreme importance that the latter should be substituted for the former. There may be grounds for difference of opinion as to which is the better form of agreement, but had the Senate entirely rejected these proposed treaties the failure to substitute the Knox agreement for arbitration as a substitute for the Root agreement for arbitration could not by any impartial mind be deemed a serious blow to the cause of international arbitration. There is well-founded basis for the contention that the Root form of agreement for arbitration as now found in these twenty-five existing treaties is the better of the two.

It is profitable to analyze these two forms of agreement for arbitration and determine wherein their differences consist.

1. In each of the twenty-five Root treaties it is agreed that the international differences shall be referred for settlement to the Permanent Court of Arbitration at The Hague. In the two Knox treaties it is provided that these international differences shall be referred to this court at The Hague " or to some other tribunal " as may be decided by the parties in each case. This difference in the terms, respectively, of the Root and Knox agreements is inappreciable, and is unimportant in view of the fact that in case of any difference arising between the United States and any one of these twenty-five nations it would be perfectly competent, if desired, for the parties to agree to refer the same for settlement to some other tribunal than the Permanent Court at The Hague.

2. In each of the twenty-five existing Root treaties it is provided that, where diplomacy has been unable to adjust them, there shall be submitted to arbitration differences " of a legal nature or relating to interpretation of treaties existing between the two contracting parties." In each of the two proposed Knox treaties it is provided that where diplomacy has been unable to adjust them there shall be submitted to arbitration differences " relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity."

There is room for question whether in the field of international jurisprudence, the simple phrase " differences of a legal nature " which is found in each of these twenty-five Root treaties, is not the full equivalent of the more elaborate designation which is found in the above quotation from the proposed Knox treaties. Indeed, unless the words " by virtue of a claim of right " are surplusage, the designation of the subject of arbitration as those " of a legal nature " is the broader of the two, as it is not limited by this qualification. The phrase " of a legal nature " possesses the twin virtues of simplicity and comprehensiveness, to which may be added as well that of brevity. The designation of the subjects of arbitration as found in the above quotation

from the proposed Knox treaties would furnish a rich and inviting field for the discussions of the casuist and the hair-splitter.

3. The Root treaties add to the agreement to arbitrate "differences which may arise of a legal nature or relating to the interpretation of treaties" the proviso "that they do not affect the vital interests, the independence, or the honor of the two Contracting States." The Knox treaties in the agreement to arbitrate differences "which are justiciable in their nature, etc.," do not contain this proviso.

The omission of this proviso from the Knox treaties is esteemed by many as the important advance made in them in the cause of international arbitration, in that, as it is claimed by them, the field of arbitration is thereby broadened. But in reply to that contention it is to be noted that when there was pointed out the intolerable danger of an irrevocable treaty agreement to submit to arbitration with a foreign power all differences which might hereafter arise affecting the vital interests, the independence, or the honor of the United States, the advocates of these treaties replied and urged most strenuously that the terms of the agreement to arbitrate as expressed in the Knox treaties could not be construed to embrace any differences of this character. It was most resolutely contended by them that no differences affecting the vital interests, the independence, or the honor of the United States could be "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity"; and particularly was it urged that no "claim of right" against the United States could be made by a foreign power regarding differences of this nature; and that without "a claim of right" there could be no demand upon the United States for arbitration. An examination of extended debates in the Senate on the subject of these proposed treaties will abundantly establish the correctness of this statement. Senator McCumber, a member of the Senate Committee on Foreign Relations and one of the most earnest advocates of the ratification of the Knox treaties, said specifically, that which was in debate stated generally or by necessary implication by practically all other advocates thereof, that under the Knox treaties nothing could be submitted for arbitration that could not now be submitted under existing treaties.

So that, judged by the construction put upon it by the

advocates of the Knox treaties, the omission in them of the proviso found in the Root treaties does not broaden the scope of the arbitration agreement found in the former.

But whatever differences of opinion there may be in regard to that part of the treaties defining the scope of the agreement to arbitrate, as found respectively in the Root and the Knox treaties, the Senate did not amend that part of the proposed treaties with Great Britain and France, but, giving to it the benefit of the doubt, accepted and ratified in its entirety that part of these treaties found in the first paragraph of Article I. which is hereinbefore quoted, the only change made being to substitute the word " shall " for the word " may " for the purpose of correcting a manifest verbal error.

With this slight correction of a verbal error the Senate agreed not only to the paragraph which has been analyzed, but consented to the ratification of these treaties with only two changes by two amendments which it is important to note accurately, one of them being to the text of a subsequent part of each treaty and the other being engrafted on the resolution of ratification.

It has been so widely and generally represented that the amendments adopted by the Senate had so emasculated these treaties as to render them of no value, that to properly show the inaccuracy of this representation it is important through the foregoing narration to clearly indicate what parts of these treaties have been left unamended, and further to state definitely what amendments were adopted and the effect thereof.

The amendment to the text above referred to consists in striking out the third paragraph of Article III. hereinafter quoted. The nature of this paragraph and its relation to a similar article in the Hague Convention it is necessary to explain.

In the Hague Convention, agreed to by forty-five nations, there is a provision for the international Commission of Inquiry, the duty of which is, in case of international disputes,

"to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation."

In defining the duties and powers of this commission in the Hague Convention it is provided as follows:

"The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves the parties entire freedom as to the effect to be given to the Statement."

The Knox treaties in Article II. each creates a similar "Commission of Inquiry," to be composed of three members of each party to the dispute, "or the commission may be otherwise constituted in any particular case by the terms of the conference."

Article III. of these proposed treaties defining the duties and powers of this commission is as follows:

"Article III. The Joint High Commission of Inquiry, instituted in each case as provided for in Article II., is authorized to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate.

"The reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law, and shall in no way have the character of an arbitral award.

"It is further agreed, however, that in cases in which the Parties disagree as to whether or not a difference is subject to arbitration under Article I. of this Treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I., it shall be referred to arbitration in accordance with the provisions of this Treaty."

The first two paragraphs of this Article are evidently taken from the corresponding Article of the Hague Convention above quoted. The third paragraph of this Article is, however, entirely new and is unlike any other treaty ever proposed or made by the United States or by any other nation. If construed according to the plain meaning of the words taken in connection with the context, the purpose of the third paragraph is that the United States shall be bound by the decision of this Court of Inquiry to submit to arbitration a given question of difference even though in the opinion of the President, or of the Senate, or of both, it is not a proper matter to be left to the decision of the Court of Arbitration. Under this construction, in case the Senate should determine, in the exercise of its constitutional function and duty, that a given question of difference did not fall within the terms of the treaty, or was one so vitally concerning the people of the United States that it could not be safely left to the decision of a court of arbitration, the

judgment of the Senate in that regard would not be final. On the contrary, it would under this construction of this paragraph be referred to this Commission of Inquiry, which might be composed entirely of foreigners, and if this Commission determined that it was a matter which should be arbitrated the Senate would be bound by the plighted faith of our Government to agree to the necessary treaty of arbitration, although the Senators under their oaths and their consciences should be of opinion that it was dangerous to the interest of the country to make such a treaty of arbitration in that particular case. In other words, the judgment of an outside commission would be substituted for the judgment of the Senate. How utterly in violation of the Constitution this would be is emphasized by the requirement of that instrument not only that the consent of the Senate shall be necessary to the making of the treaty, but that the consent of two-thirds of the Senate shall be necessary. The framers of the Constitution were unwilling that the consent of a majority only of the Senate should be sufficient to make a treaty, but the framers of these treaties, if this construction be correct, are willing that an unknown outside commission, composed possibly of foreigners, shall determine in the place of two-thirds of the Senate, and even against the judgment of the Senate, as to the making of treaties relating to subjects involving the most vital interests of the country, some of which are now known, but many of which cannot be anticipated, although certain to arise in the future.

The vesting of the treaty-making power in part in the Senate is one of the gravest features of our Constitution and one of the most important to be guarded and preserved. A statute law enacted by Congress is declared by the Constitution to be the supreme law of the land. A treaty under the Constitution is also declared by that instrument to be the supreme law of the land. A treaty, made with the advice and consent of the Senate, is of equal dignity with an Act of Congress. It is not open to argument that the provisions of the Constitution relative to the manner and authority in and by which treaties shall be made are as imperative and as important to be guarded and preserved as are those other provisions of the Constitution prescribing the manner and authority in and by which statutory law shall be enacted.

In the Convention which framed the Constitution there was never a contemplation that treaties should be made without the full participation of the Senate. On the contrary, the original draft of the Constitution reported by the Committee to the Convention vested the treaty-making power in the Senate alone. It was only in the closing days of the Convention that the suggestion was made by Mr. Madison and adopted that the President should have the initiative in the negotiation of treaties, the change having evidently been made in consideration of convenience; but the provision was most carefully guarded that the mighty power of making treaties with foreign nations should only be exercised with the advice and consent of two-thirds of the Senators present.

In refusing to permit a part of the treaty-making power to be delegated to an outside commission, the Senate is but guarding inviolate a vital and fundamental provision of the Constitution. To do otherwise would be to trifle with its duty.

In providing that the consent of two-thirds of the Senate shall be necessary to the making of a treaty, the plain purpose and intent was that that consent should be given to each and every part of a treaty. If a part of a treaty can be excepted from that requirement, then can also be another part, and there is no point in a proposed treaty at which the line could be drawn. This proposition appears to be too plain to require argument to sustain it. Accepting this as the rule, the fact is apparent that whenever it is proposed to submit an international dispute to arbitration, the decision of the question, "Is this a proper subject-matter or controversy to submit to arbitration?" is not only a part of it, but it is the vital thing to be decided in agreeing or consenting to the making of a treaty of arbitration relative thereto. It is in every proposed treaty of arbitration not only a vital, but it is necessarily the controlling question, the decision of which determines whether the Senate will, in exercising its constitutional function, consent to the proposed treaty or whether the Senate will reject it.

For instance, in 1895, when we intervened in behalf of Venezuela in her controversy with Great Britain regarding a portion of territory claimed by each, we based our action on the right we claimed to interfere under the Monroe Doctrine. If this proposed treaty had then been in force, England could have claimed the right to the arbitration of

our right to interfere in that controversy. Under the terms of the proposed treaty, if then existing, it would, upon our objecting, have been within the power of an outside commission to determine for the Senate that the Monroe Doctrine, and the right to assert it by the United States, constituted a proper subject-matter of arbitration under the terms of the treaty; and with such decision by this outside commission the Senate would have been bound to consent to a treaty submitting that question to arbitration, and would have violated the plighted faith of the United States if it had refused to consent to such treaty of arbitration under such a demand from Great Britain.

The main question for the Senate, when such a treaty of arbitration involving the Monroe Doctrine was proposed, would have been, "Will the Senate consent to submit this to arbitration?" Under the Knox treaties if the Senate said "No," that question of consent, which under the Constitution devolves upon the Senate, would have been decided by the outside commission.

Further illustrations, in case similar treaties are made with other nations, could be made regarding questions which relate to the control of the immigration of those, Asiatics or others, who are undesirable to us; to the right of Asiatics to enter our schools in the several States; to the integrity of the territory of the United States or of any one of the States; to our control within certain limitations of the affairs of Cuba, including our prohibition of the grant of any naval base on the island to any other nation; to our fortification of the Panama Canal; to the objection we should urge if any great power should seek a naval or military base within our sphere which would in any way be a menace to our peace and safety; and to many other questions, existing and hereafter to develop, vital to us as a people. In each of these and kindred cases whenever a proposition of arbitration is submitted to the Senate, the final determination of consent or refusal to consent to make the treaty of arbitration belongs to the Senate and to it alone. It cannot be delegated to another body, whether that be an outside commission or otherwise constituted. This was the view taken by the Senate Committee on Foreign Relations who recommended to the Senate in a forceful report that the third paragraph of the third Article above quoted be stricken from the proposed treaties. In so doing the committee said:

"This recommendation is made because there can be no question that through the machinery of the joint commission, as provided in Articles II. and III. and with the last clause of Article III. included, the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The Committee believes that it would be a violation of the Constitution of the United States to confer upon an outside Commission powers which under the Constitution devolve upon the Senate."

And again the committee say in the same report:

"To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable."

The position of the Committee on Foreign Relations was in this contention so unassailable that the advocates of the treaty who opposed any amendment to its text took refuge in the contention that the third paragraph of the third Article did not in any manner abridge the constitutional powers of the Senate, and that after a decision by the outside commission that the matter in difference is arbitrable under the treaty, the Senate would be under no obligation to submit it to arbitration in conformity with such decision. It is difficult to find any reasoning upon which such construction can rest, as the language of the third paragraph of the third Article with the context seems to plainly indicate the contrary intention. If it means that the decision of the commission imposes no obligation on the Senate, it is surplusage and practically means nothing.

Senators were unwilling that the power should be left as expressed in the paragraph even though the advocates of the treaties construed that language to mean other than what it plainly imported. This construction by the advocates of the unamended treaties would not be binding upon the nations with whom we contracted these treaty obligations. Courts do not construe a statute by inquiring of the legislators what they intended in the use of the language they employed in the enactment of the laws.

Believing that the third paragraph of the third Article of the Knox treaties, in its delegation of the power of the Senate to an outside commission, was in violation of the Constitution and that as well such delegation was unwise and dangerous, the Senate struck it out in the proposed treaties both with Great Britain and with France.

There are many vital questions, it will be generally admitted, that the United States would not submit to the final determination of others; and it is worse than unwise to solemnly enter into obligations to do so which it is well known we would not recognize and observe when the occasion arose. It is no reply to say that questions of this class are not included in the terms of the proposed treaties. These treaties do not leave us as the judges whether a given difference between the nations presents a question to be submitted to arbitration. If we should think it not arbitrable under the treaty, and the other nation should contend that it is arbitrable, by the terms of the third paragraph of the third Article found in each treaty the outside commission would have the final determination whether it was or was not arbitrable.

It is proper and desirable that there shall be general treaties of arbitration and that the agreement to arbitrate shall be as comprehensive of the classes of international differences to be submitted to peaceful arbitration as is consistent with our welfare and safety; but the President and the Senate, constituting the treaty-making power under the Constitution, can be the only constitutional authority to determine, when an international difference arises, whether it falls within the terms of the treaty and should, in consequence, be submitted to arbitration in accordance therewith. And when the President and the Senate so decide and agree to submit that difference to arbitration, the award of the court of arbitration thus legally authorized should be abided by and performed though the heavens fall.

The contention that the Senate had, by amendment, so mangled the proposed treaties as to emasculate and practically destroy them cannot withstand the test of examination. Besides the correction of the verbal error already mentioned the Senate made but two amendments. There was but one amendment made to the text of the treaties, and that was to strike out the third paragraph of the third Article which has been under discussion. Every other part of the text of the treaties is left untouched. The contention that the striking out of this third paragraph had emasculated the treaties and destroyed their value can only be supported by showing that that paragraph is of vital importance to the treaties. Unfortunately, with scarcely an exception, every advocate of the unamended treaties differs from every

other advocate thereof as to the meaning and effect of this paragraph. Without this third paragraph the Commission of Inquiry still remains with its powers to make examinations and report findings of fact and law with recommendations thereon. This third paragraph could only be vital to the treaty in case the purpose of the treaty was to coerce the Senate to unwillingly submit a given matter to arbitration, and this third paragraph was the means devised for that coercion. There is no other vital function that can be ascribed to this third paragraph, and if it has no such vital function its elimination cannot result in the practical destruction of the treaty. Its advocates in America generally and with scarcely an exception, while differing in other particulars, contend that the third paragraph gives no such power. If the foreign nations intended that this third paragraph should perform this function, and now discard the proposed treaties because by the elimination of the paragraph that intention is defeated, no better argument could be advanced in support of the Senate's action in striking out that paragraph.

Until there is pointed out what vital function this third paragraph was intended to perform, and how its elimination has destroyed or practically impaired the remaining parts of these treaties, their abandonment must find other grounds on which to rest; for it must be conceded that unless the finding of the outside commission, as provided in that third paragraph, would be binding on the Senate, the treaties are as far-reaching and effective without that paragraph as they are with it included.

Other than the verbal correction and the striking out of the third paragraph of the third Article, the Committee on Foreign Relations recommended to the Senate no change or amendment. If the advocates of the treaties had been content with them thus amended, there would have been no contention and they would have been agreed to by the Senate with practical unanimity. But in the very earnest discussion which followed the opposition to the proposed amendment, the dangers pointed out in regard to the compulsory arbitration of certain differences which might arise were so manifest that the Senate by the decisive vote of 46 to 36 engrafted upon the resolution of ratification in the case of each treaty that it would not

"authorize the submission to arbitration of any question which affects the

admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States, or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy."

These are subjects which vitally concern our welfare and safety. It can be conceived that occasion may occur when we would be willing to submit to arbitration international differences which may arise as to some of them; but there is no one of them which we would be willing to bind ourselves in advance to arbitrate, regardless of circumstances which may attend when the particular question is presented for determination.

It is to be further remarked that without exception the advocates of the unamended treaties contended most ardently that the terms of these treaties do not embrace differences as to any of these subjects included in the amendment. If so, the expression of their exclusion has in no wise destroyed or weakened these treaties.

Should these Knox treaties not be finally concluded and proclaimed, the cause of peaceful arbitration of international differences will not be endangered. In the first place, the twenty-five Root treaties make provision for the peaceful arbitration of every question that it is at all probable the United States will submit to arbitration. And should a special occasion arise not covered by the Root treaties, there is no reason to fear that in every proper case a special arbitration treaty will be made to meet that case. The fact that we have heretofore made seventy-four arbitration treaties with other nations is abundant guarantee that such will be done when the occasion demands. In the long years only one case suggests itself in which we have refused an arbitration which in the opinion of many should have been granted, and that case, among so many, is an illustration of the meaning of the adage that the exception proves the rule.

AUGUSTUS O. BACON.